

nondiscrimination provisions of Title II of the Telecommunications Act, almost all independent ISPs will be foreclosed from the dominant portion of the broadband Internet market entirely.

B. Cable Remains the Dominant Provider of Broadband Services.

Numerous cable providers⁴⁸ point to the expanding broadband market and the emergence of competitive broadband access alternatives as evidence that the market for broadband services is competitive and that marketplace forces are working. However, when the cable industry admonishes the Commission to “let the market work,” what it really means is “let current market conditions continue” so that the cable industry can further solidify its dominant market share by continuing to escape the open access obligations imposed on its only real competitor, DSL.⁴⁹

Claims by the cable industry that dial-up and cable broadband Internet access services comprise the same market⁵⁰ ignore fundamental distinctions between the two services as well as stark market realities.⁵¹ The markets for dial-up and cable broadband Internet access services are distinct, and this distinction does not lie solely in speed differential (although broadband Internet access is generally fifty to one hundred times faster than traditional dial-up service). Rather, the

⁴⁸ See Cox at 5-7, Comcast at 5-10, AT&T at 35-46, *Comments of Charter Communications* at 3-7 (hereinafter “Charter”); *Comments of Cablevision* at 7-11 (hereinafter “Cablevision”).

⁴⁹ *Comments of Texas PUC* at 15 (hereinafter “Texas PUC”).

⁵⁰ Charter at 6; Cox at 8; AT&T at 47, claiming that “cable Internet service providers’ principal competitors remain the dial-up narrowband services over which 90 percent of subscribers nationwide obtain access to the Internet.”

⁵¹ AT&T itself has essentially admitted this. The consent decree entered into by AT&T, MediaOne and the United States Department of Justice recognizes that competitive protections are necessary and appropriate with respect *not* to the *overall* Internet access market, but rather to the “Residential Broadband Service” market, which is defined to mean the provision of Internet access at speeds in excess of 128 kilobits per second. *United States of America v. AT&T Corp. and MediaOne Group, Inc.*, United States District Court for the District of Columbia, Final Judgment, submitted May 25, 2000. The referenced definition appears at para. II.F.

primary distinction lies in the additional services enabled by broadband, such as real-time audio downloads, video conferencing and streaming video, that are not available or technically feasible over a dial-up connection. Simply put, the services are not exact substitutes for one another and therefore not part of the same market.⁵² Customers underscore the distinction between the markets, as Big Planet notes in its comments, by their unwillingness to switch back to narrowband after choosing broadband, even in the face of broadband price increases.⁵³ Even AT&T Canada long distance recognizes that dial-up and broadband are two distinct markets.⁵⁴

Within the context of this relevant market, cable broadband remains the dominant market player, with only one notable competitor—DSL. Although numerous cable providers point to satellite and fixed wireless as potential competitors,⁵⁵ these products are in their infancy, many are high-speed in only one direction, and they comprise a mere 3,649 subscribers (or 0.2% of the total advanced services subscribers in the country).⁵⁶ Cable modems control 71% of the total broadband Internet access market compared to DSL's 22%.⁵⁷ Although businesses utilize a wide

⁵² Substitutability is the main consideration by economists in defining relevant markets. See Affidavit of Nels Pearsall, Keith Reutter and Robert Sinclair, attached to Competitive Access Coalition. "We also do not consider traditional narrowband 'dial up' network access to be an adequate substitute for the broadband network," Affidavit at 7.

⁵³ *Comments of Big Planet* at 5 (hereinafter "Big Planet").

⁵⁴ See AT&T Canada Long Distance Services' Comments in Response to the Canadian Radio-television and Telecommunications Commission's Telecom Public Notice 96-36, submitted February 4, 1997, pp. 6-7.

⁵⁵ AT&T at 45; Charter at 4.

⁵⁶ Federal Communications Commission *Report on Internet Access Subscribership*, October 2000. Even Echostar Satellite Company admits in its comments that its broadband service is "relatively cumbersome for consumers," is "seriously bandwidth-limited," and "simply cannot compete" with cable offerings. *Comments of Echostar* at 5 (hereinafter "Echostar").

⁵⁷ Big Planet at 4, citing United States General Accounting Office (GAO) Report to the Subcommittee on Antitrust, Business Rights and Competition Committee on the Judiciary, US Senate, *Technological and Regulatory Factors Affecting Consumer Choice of Internet Providers*, October 2000, at 12, 44.

range of Internet access products (such as T-1 and T-3 lines), residential broadband access is limited, for the most part, to either cable modem or DSL. “For all practical purposes, Cable and DSL are currently the only broadband options available in the residential market and Cable has a substantial lead over DSL.”⁵⁸

Even within the broadband marketplace, cable and DSL do not always compete head-to-head. In fact, “cable modem service may be the only broadband provider in up to 50% of residential homes.”⁵⁹ In these geographic areas, cable carriers have monopoly power and exercise bottleneck control over essential broadband facilities. The Commission, through its current “hands off” policy, is creating a broadband monopoly in these areas by not enforcing common carriage nondiscrimination requirements on these cable carriers.

Since 20-40% of local exchange carriers’ local loops are not capable of being upgraded to provide DSL,⁶⁰ for many residential Internet customers, cable will be the sole broadband network available. As Professors Bar, *et al.*, point out:

Overall national figures, whether market share or addressability, provide a misleading picture of the competitive situation. Indeed in the short to medium term, broadband cable and DSL deployments are taking place along two distinct footprints, with relatively limited overlap. The cable modem footprint generally covers only residential areas and clearly dominates in many suburbs. While we can expect that eventually, most homes will have a choice between two broadband wires, cable and DSL, in the

⁵⁸ “Access and Innovation Policy for the Third-Generation Internet,” Bar, Cohen, Cowhey, deLong, Kleeman, Zysman, Telecommunication Policy, Volume 24, Nos. 6/7 (July/August 2000).

⁵⁹ Jeffrey K. MacKie-Mason, “*Investment in Cable Broadband Infrastructure: Open Access is Not an Obstacle*,” November 5, 1999 at A-6, citing “*Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*,” CC Docket No. 98-146, Federal Communications Commission, January 1999, pp. 24-25.

⁶⁰ Big Planet at 7, citing FCC Advanced Services Report at 46.

near term most will only have one option, and in most cases that option will be cable.

Cable operators and Telcos often are not really competing head-on, having essentially partitioned the broadband access market: cable modems for residences, DSL for small and medium sized-businesses.⁶¹

Even in areas where consumers have a choice of both DSL and cable modem for broadband Internet access, the broadband access market is at best a duopoly. As Worldcom points out, duopolies in markets where entry is difficult are anticompetitive.⁶² Moreover, in these markets, inefficiencies exist due to the inconsistent regulatory approaches governing each access service. Customers cannot hop between DSL and cable modem service and still maintain their preferred ISP as well as their existing email address.⁶³ Thus, absent a national open access policy applicable to all cable broadband providers, the broadband market is less efficient because consumers cannot easily substitute services, resulting in decreased competition between DSL and cable modem service. These competitive disparities could be substantially eliminated through consistent application of Title II common carrier nondiscrimination and interconnection principles to all telecommunications providers, including providers of cable modem broadband transport.

⁶¹ Bar, Cohen, Cowhey, deLong, Kleeman, Zysman, at 17, 19, citing "Broadband!," A Joint Industry Study by McKinsey and Sanford Bernstein, January 2000. p. 10-11.

⁶² Worldcom at 7, citing *FTC v. Heinz, H.J. Co.*, No. 00-5362, 2000 WLL 1741320 (D.C. Cir. Nov. 8, 2000).

⁶³ Similarly, Congress and the FCC recognized, in relation to number portability, that consumers are less likely to switch service providers if they cannot retain their previous number, or, in this case, email address.

C. Despite Two Years of Rhetoric to the Contrary, the Cable Industry Now Admits That Open Access is, in Fact, in Its Best Business Interest.

In an attachment to the National Cable Television's Association's comments in this proceeding,⁶⁴ three consultants to the NCTA set forth various economic rationales as to why open access is, all of a sudden, strategically and financially beneficial to cable broadband providers. In this paper, the cable industry adopts many of the economic and policy positions that OpenNet and its individual members have been advancing since this debate began—that cable operators lose profits by offering only their proprietary ISP service and cable provider profits increase with the number of ISPs offered.⁶⁵

In adopting this approach, NCTA seeks to convince the Commission that action in this docket is unnecessary because significant market incentives already exist for the cable industry to pursue open access. However, the Commission should not misinterpret this philosophical “conversion” by the cable industry as a substitute for the implementation of true nondiscriminatory and enforceable open access. While this dramatic reversal in position is as welcome as it is astonishing, the OpenNet Coalition implores the Commission to employ a “trust but verify” approach to monitoring future cable industry progress on opening cable broadband networks, coupled with the Commission's establishment of a national open access policy applicable to the entire cable industry that ensures effective enforcement for all ISPs and their customers.

Despite its recent theoretical commitment to the economic principles of open access, the cable industry's real world record of signing and implementing open access agreements with

⁶⁴ Stanley Besen, Patrick DeGraba and John Woodbury, “*The Incentives of Cable Operators to Carry Multiple ISPs*,” December 1, 2000, attached to NCTA comments.

⁶⁵ Id. at 3, 4.

unaffiliated ISPs remains virtually nonexistent. The only way for the Commission to hold the cable industry accountable to its newly-found realization is to recognize cable modem service as a telecommunications service subject to Title II common carrier nondiscrimination obligations.

IV. THE COMMISSION SHOULD ACT TO ENSURE OPEN ACCESS BY CREATING A NONDISCRIMINATORY FRAMEWORK FOR THE NEGOTIATION OF OPEN ACCESS AGREEMENTS.

A. Once the Commission Declares That Cable Modem Service is Subject to Title II, the Statutory Obligations of Non-Discrimination and Interconnection are Triggered.

Once cable companies expanded their palette of services to include telecommunications services, they became subject to the common carrier provisions of the Telecommunications Act. The provisions of Title II of the Act establish the necessary foundation for a market-based solution to the issue of open access. Sections 201 and 202 of the Act set forth a baseline of nondiscrimination for the provision of telecommunications services. These sections ensure that all telecommunications providers, including cable companies offering cable modem service, set charges that are “just and reasonable”⁶⁶ and that no preference is given to any, “...particular person, class of persons or locality.”⁶⁷ The Act then sets forth a duty of telecommunications carriers to interconnect with other telecommunications carriers in Section 251.

Under the framework established by Sections 201, 202 and 251, negotiations can commence on a good faith basis between cable companies and ISPs. The undertaking of such negotiations, of course, in no way obviates a cable operator’s statutory nondiscrimination or interconnection duties. Indeed, it is clear that absent the overlay of Title II’s protections, cable

⁶⁶ 47 U.S.C. § 201 (b).

⁶⁷ 47 U.S.C. § 201 (a).

companies will not engage in any meaningful access negotiations with ISPs.⁶⁸ It is not realistic to assume that absent a statutory mandate, a cable company would negotiate on fair and equitable terms with an identified competitor. In that regard, almost all of the comments submitted by the providers of cable modem service expressly make the point that they treat ISPs providing dial-up and DSL Internet connections as competitors.⁶⁹

Therefore, if the Commission accepts the fact that open access is a desirable public policy, but fails to extend to all Americans the Ninth Circuit's *Portland* ruling by recognizing cable modem service a telecommunications service, it will not have remedied the very ill it has identified. Cable broadband providers, as providers of telecommunications services, are statutorily prohibited from continuing to pick and choose which, if any, competitors they (or their affiliated ISPs) will face in the broadband marketplace. So long as the dominant player in a market is given effective control over the ability of competitors to enter the market, the benefits derived from open and robust competition will remain unrealized. The end result will be a continuation of the predatory pricing, bad faith negotiation, and endless delay that the ISP community has experienced to date from cable broadband providers.⁷⁰

The Federal Trade Commission established a framework for nondiscriminatory negotiations between cable companies and ISPs in its AOL-Time Warner consent decree.⁷¹ This

⁶⁸ See Affidavit of Stephen Heins attached to *Comments of The Consumer and ISP Representatives* (hereinafter "NorthNet") demonstrates the problem of relying solely on the marketplace to produce open access.

⁶⁹ See, e.g., Cox at ii, 5-8; Charter at 3-7; Comcast at 5-10 and Cablevision at 7-11.

⁷⁰ NorthNet at Affidavit of Stephen Heins, BrandX at 2.

⁷¹ The FTC Consent Order requires AOL-TW to allow at least one independent ISP to provide cable modem service in a market before it offers cable modem service through an affiliated ISP. AOL-TW must then reach access agreements with at least two additional independent ISPs within 90 days of AOL-

framework must be applied to all cable modem providers, as the FTC's consent order only addresses those markets served by AOL-Time Warner. Even this model, however, does not supercede a cable operator's Title II obligations as a telecommunications service provider.

While Title II establishes a statutory baseline, and the FTC's AOL-Time Warner consent decree provides a model, the Commission can and should further act to ensure a speedy and fair roll out of open access by establishing a framework for the ancillary issues attendant to open access negotiations. This framework would address issues such as identifying technically feasible points for access, prohibiting discriminatory use of customer information, ensuring a level playing field in the marketing of services to potential customers, and restricting network activities which discriminate against independent ISPs receiving transport service from cable companies.⁷² This is important because the experience of small and medium-sized ISPs attempting to enter into access negotiations with cable providers demonstrates that, given the opportunity, cable providers will use any means possible to delay such negotiations thereby enabling them to continue to strengthen their first mover advantage in the broadband marketplace.⁷³

Thus, the Commission should not use this proceeding to determine *if* cable companies must provide open access to their networks, but rather *how* open access to those telecommunications services will be accomplished under the existing requirements of Title II.

TW providing cable modem service. Jim Hu, *FTC Approves AOL-Time Warner Merger*, CNET NEWS (December 14, 2000) @<http://news.cnet.com/news/0-1005-200-4149427.html>.

⁷² This type of framework is essential as certain cable operators continue to throw technical roadblocks in the face of open access, such as AT&T's continued assertion that it must complete technical trials to determine if open access is technically feasible. BrandX at 2.

⁷³ The comments submitted by NorthNet illustrate the difficulty faced by a relatively smaller company seeking to negotiate with a large entrenched *de facto* monopoly. NorthNet at Affidavit of Stephen Heins.

This determination may be accomplished by establishing a clear framework for the negotiation of access agreements by cable operators and ISPs and a mechanism to resolve any conflicts that may arise. Through such action the Commission will ensure that all ISPs, both large national companies and smaller regional and local providers, will have a level playing field to negotiate beneficial agreements with cable companies for the provision of competitive cable modem services, and thereby benefit consumers.

B. It is Well Settled that Like Services Must be Governed in a Like Manner.

In response to increasing competition in their core programming business, cable operators are using their cable facilities for the provision of broadband Internet transport/access service⁷⁴—a telecommunications service subject to Title II. Cable operators are also rapidly transforming their facilities into broadband networks that have the potential to supplant telephone company local loops as the most efficient and highest-capacity last-mile delivery systems available.⁷⁵ Through these revamped systems, many cable operators can now offer “basic” and “enhanced” services over one connection into homes and businesses in direct competition with the services that incumbent and new-entrant LECs offer.⁷⁶

In short, over the last few years and in response to the evolving marketplace and the 1996 Act, cable operators have *voluntarily* transformed themselves into common carriers as a result of these new service offerings and business plans. As a result, cable operators can no longer credibly argue that they are not similarly situated with telephone companies with respect to these

⁷⁴ Comcast at 5-8; Cox at 2-5.

⁷⁵ Comcast at 5-8; Cox at 2-6, 18-20.

⁷⁶ Cablevision at 6-9.

new telecommunications offerings but rather are entitled to exclusive Title VI regulation. As a matter of law, telecommunications services offered by traditional cable operators are inherently subject to Title II notwithstanding the historical regulatory treatment of the cable industry. The open access model championed by the OpenNet Coalition, which is substantially similar to the Commission's first model proposed in the NOI, would effectively implement this legal requirement by requiring nondiscriminatory access,⁷⁷ similar to requirements that apply to any CLEC or other new entrant providers.

Cable operators believe that DBS providers, DSL service providers, MMDS, and other alternative broadband providers are providing adequate competition in the broadband Internet access industry.⁷⁸ Moreover, Cox Communications specifically contends that "there is absolutely no evidence that all broadband services must be subjected to common carrier regulation to ensure that the broadband marketplace develops or that American consumers are well-served."⁷⁹

V. CONCLUSION

For the foregoing reasons, the OpenNet Coalition respectfully requests that the Commission recognize cable modem service as a telecommunications service subject to the Communication Act's nondiscrimination and interconnection requirements. Further, the Open Net Coalition asks the Commission to establish a uniform national framework for the negotiation of nondiscriminatory access to broadband cable networks.

⁷⁷ *Comments of the OpenNet Coalition* at 21-24 (hereinafter "OpenNet Coalition"); NOI at ¶ 30.

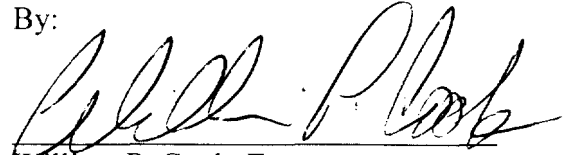
⁷⁸ AT&T at 94-95, 97-98; Cox at 12; Cablevision at 5-9; Comcast at 8-11; Charter at 3-7.

⁷⁹ Cox at 17.

Respectfully submitted,

OpenNET COALITION

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A handwritten signature in black ink, appearing to read "William P. Cook", written over a horizontal line.

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